Wei Hsing Food (S) Pte Ltd v The Owners or Demise Charterers of The Ship or Vessel 'The Neptune' and another action

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D1–27–25 OF 2002 AND NO D1–27–26 OF 2002

VINCENT NG J

6 APRIL 2005

Civil Procedure — Admiralty — Parties — 'Owner' — 'Beneficial Owner' — Whether defendant owner or beneficial owner of vessel — Whether defendant could enter appearance as of right, conditional or otherwise —Courts of Judicature Act 1964 s 24(b) — Supreme Court Act 1981 (UK) s 21(4)

Civil Procedure — Admiralty — Parties — Whether an intervener entitled to move court to set aside or strike out a writ of action — Rules of the High Court 1980 O 70 r 16

Words and Phrases — 'beneficial owner of all the shares in the ship' — Supreme Court Act 1981 (UK) s 21(4)

Words and Phrases — 'relevant person' — Supreme Court Act 1981 (UK) s 21(4)

There were two appeals arising from the two decisions of the senior assistant registrar ('SAR') in an admiralty suit. In the first appeal, the defendant appealed against the decision of the SAR dismissing the defendants' application to set aside the plaintiffs' claim for the price of goods and materials or necessaries supplied to the vessel 'The Neptune'. In the second appeal, the plaintiffs appealed against the decision of the SAR who disallowed the plaintiffs' application to set aside the conditional appearance entered by the defendant who was the present owners of 'The Neptune'.

Held, allowing the plaintiffs' appeal and dismissing the defendant's appeal with cost:

(1) In Malaysia, the court's admiralty jurisdiction is conferred by s 24(b) of the Courts of Judicature Act 1964 ('CJA'). Section 24(b) of the CJA gives effect to a statute of the United Kingdom Parliament, namely the Supreme Court Act 1981 ('SCA') and renders the SCA as governing law applicable in matters of admiralty in Malaysia. Section 24(b) of the CJA empowers the Malaysian courts to apply the provisions of the SCA in the same manner as an English High Court would do when determining an admiralty matter under the SCA (see para 7); *Kawasaki Kesin Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433 followed.

(2) The term 'beneficial owner of all the shares in the ship' found in s 21(4) of SCA refers to the person named as the owner of the vessel at the port of registry where the ship is registered. Only that particular person, who is the 'relevant person', fulfilling either of the two criteria stipulated by s 21(4) of the SCA, can become the proper defendant to the suit. This is 'the relevant person' who would be liable to the plaintiff on the action in personam, that is, suffer personal liability in the event the plaintiff succeeds in proving his claim. Thus, only the 'relevant person' could enter appearance as of right, conditional or otherwise, in the capacity of a defendant (see para 22).

(3) It followed that at the two material times, that is, the time when the cause of action arose and when the writ was issued, one Salient Marine was the owner of 'The Neptune'. Thus, according to well settled principles, the fact that the vessel is now registered in the name of one Louis Herbelin has no effect on the plaintiffs' claim because when the writ was issued 'The Neptune' was owned by Salient Marine, which vessel was then attached with a statutory lien and this lien ought to continue and survive any subsequent change of ownership (see para 31).

(4) While there was no need to specifically name the defendant on an admiralty writ *in rem*, because the Rules of the High Court 1980 ('RHC') does not require this, yet no person other than 'that person' who was the owner of the ship or vessel when the cause of action arose or the owner or the demise charterer of the vessel when the writ was issued could, in proper procedure, and as of right, enter appearance as a defendant. In the event, as Louis Herbelin was not 'that person' it cannot enter appearance as a defendant in this admiralty suit and their appearance so entered was hereby set aside (see para 33).

(5) As an intervener pursuant to O 70 r 16 of the RHC, Louis Herbelin was not entitled to move the court to set aside or strike out the writ as this right was only available to a proper defendant who may be liable on the claim (see para 36).

[**Bahasa Malaysia summary**

Terdapat dua rayuan yang timbul dari dua keputusan penolong kanan pendaftar ('SAR') di dalam satu guaman admiralti ini. Di dalam rayuan pertama, defendan merayu terhadap keputusan SAR yang menolak permohonan defendan untuk mengetepikan tuntutan plaintif-plaintif untuk harga barang-barang dan bahan-bahan atau keperluan yang dibekalkan ke kapal 'The Neptune'. Di dalam rayuan kedua, plaintif-plaintif merayu terhadap keputusan SAR yang tidak membenarkan permohonan plaintif-plaintif untuk mengetepikan kehadiran bersyarat yang dimasukkan oleh defendan yang merupakan tuanpunya semasa 'The Neptune'.

Diputuskan, membenarkan rayuan plaintif-plaintif dan menolak rayuan defendan dengan kos:

(1) Di Malaysia, bidang kuasa admiralti mahkamah diberi di bawah s 24(b) Akta Mahkamah Kehakiman 1964 ('AMK'). Seksyen 24(b) AMK menguatkuasakan statut Parlimen United Kingdom, iaitu 'Supreme Court Act 1981' ('SCA') dan menjadikan SCA sebagai undang-undang yang diguna pakai untuk perkara-perkara admiralti di Malaysia. Seksyen 24(b) AMK memberi kuasa kepada mahkamah-mahkamah Malaysia untuk mengguna pakai peruntukan-peruntukan SCA sepeni mana Mahkamah Tinggi Inggeris mengguna pakai peruntukan tersebut dalam memutuskan sesuatu perkara admiralti di bawah SCA (lihat perenggan 7); *Kawasaki Kesin Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433 diikuti.

(2) Terma 'pemilik benefisial kesemua bahagian kapal tersebut' yang terdapat di bawah s 21(4) SCA merujuk kepada orang yang dinamakan sebagai pemilik kapal tersebut di pelabuhan di mana ianya didaftarkan. Hanyalah orang tersebut, merupakan 'orang yang relevan', yang memenuhi mana-mana dua dari kriteria-kriteria yang diperuntukkan di bawah s 21(4) SCA, yang boleh menjadi defendan yang sepatutnya dalam guaman tersebut, la merupakan 'orang yang relevan' yang akan bertanggungjawab kepada plaintif dalam tindakan in personam, iaitu, yang akan menanggung liabiliti secara peribadi jika plaintif berjaya membuktikan tuntutannya. Oleh yang demikian, hanya 'orang yang relevan' boleh memasukkan kehadiran secara hak, bersyarat atau sebaliknya, sebagai seorang defendan (lihat perenggan 22).

(3) Dari itu pada kedua-dua masa matan, iaitu, ketika kausa tindakan timbul dan pada ketika writ dikeluarkan, Salient Marine merupakan pemilik 'The Neptune'. Oleh yang demikian, menurut prinsip-prinsip yang sudah mantap, fakta bahawa kapal tersebut sekarang ini didaftarkan di atas nama seorang Louis Herbelin tidak mempunyai kesan kepada tuntutan plaintif kerana apabila writ dikeluarkan 'The Neptune' dimiliki oleh Salient Marine, di mana kapal itu pada ketika itu diikat dengan lien statutori dan lien ini wajar terus ujud dan bertahan walaupun hakmilik bertukar (lihat perenggan 31).

(4) Walaupun tidak ada keperluan untuk menamakan secara khusus nama defendan pada satu writ admiralti in rem, kerana Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak memerlukannya, namun tiada sesiapa pun melainkan 'orang tersebut' yang merupakan pemilik kapal ketika kausa tindakan timbul atau pemilik atau pencarter demis kapal tersebut apabila writ dikeluarkan boleh, dalam prosedur sepatutnya, dan secara haknya, memasukkan kehadiran sebagai seorang defendan. Dalam keadaan ini, oleh kerana Louis Herbelin bukanlah 'orang tersebut' ia

tidak boleh memasukkan kehadiran sebagai seorang defendan di dalam guaman admiralti ini dan kehadiran mereka yang telah dimasukkan itu dengan ini diketepikan (lihat perenggan 33).

(5) Sebagai seorang pencelah di bawah A 70 k 16 KMT, Louis Herbelin tidak berhak untuk memohon mahkamah untuk mengetepikan atau membatalkan writ kerana hak ini hanyalah terletak pada defendan yang sepatutnya yang boleh bertanggungjawab kepada tuntutan tersebut (lihat perenggan 36).]

Notes

For cases on parties, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 245-247.

Cases referred to

'Abel Lieutenant', The [2002] 6 MLJ 433 (refd)
'Avro Venture', The [1987] 1 MLJ 16 (refd)
'Bolbina', The [1994] 1 SLR 554 (refd)
'Fierbinti', The [1994] 3 SLR 864 (refd)
'GuiseppeDi Vittorio', The [1998] 1 Lloyds LR 136 (refd)
'Mawan', Now Named 'Mara', The [1988] 2 Ll LR 459 (refd)
'Mawan', The [1988] 2 Lloyds LR 460 (refd)
'Nordglimt', The [1987] 2 Lloyds LR 470 (refd)
'San 003' The [1979] 2 MLJ 8 (refd)
'Wigwam', The [1983] 1 MLJ 148 (refd)
Chan Min Swee v Melawangi Sdn Bhd [2000] 7 MLJ 111 (refd)
Ed & F Man Ship Ltd v Heng Holdings Sea (Pte) Ltd [1999] 1 SLR 200 (refd)
Gulf Venture [1984] 2 Lloyd's LR 445 (refd)
Hai Soon Diesel & Trading Pte Ltd Iwn Pemilik Kapal dan/atau Percarta Demis dalam Kapal 'Hope' (Ex 'Panagia') yang didaftarkan di Pelabuhan Limassol [1997] MLJU 108 (refd)
Kawasaki Kesin Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant' [2002] 6 MLJ 433 (folld)
Middle East Tankers and Freighters v Owner of the Vessel and other interested party in the-vessel o fMV 'IRA' [1996] 4 MLJ 109 (refd)
Pemunya Kapal MV Brihope v Emmanuel Okwuosa [1997] 1 MLJ 469
PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1 (refd)
Schwarz v Owners of 'St Elefterio' [1957] 1 Lloyds Rep 283 (refd)
Tian Sheng No 8', The [2000] Lloyds LR 430 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 24(b)
Rules of the High Court 1980 O 18 r 9, O 70 r 2, O 12 r 6, (2), Form 155
Rules of the Supreme court [Sing] Form 155 Supreme Court Act 1981 [UK] ss 20(2)(e)-(r), 21(4)

Mathew Kurien (Sativale Atathew Arunjfor the plaintiffs in Admiralty in rem No D1–27–25 of 2002 and No D1–27–26 of 2002, the appellants in encl 21 and the respondents in encl 20.

Philip Teoh (Philip Teoh & Co) for the defendants in Admiralty in rem No D1–27–25 of 2002 and No D1–27 –26 of 2002, the respondents in encl 21 and the appellants in encl 20.

Vincent Ng J:

[1] Before me are two appeals arising from the two decisions of the senior assistant registrar in admiralty suit No D1–27–25 of 2002. In encl 20, the defendant owners appealed against the decision of the registrar dismissing the defendants' application to set aside (to strike out) the plaintiffs' claim for the price of goods and materials or necessaries supplied to the vessel 'The Neptune'. In encl 21, the plaintiffs appealed against the decision of the registrar who disallowed the plaintiffs' application to set aside the conditional appearance entered by the defendant who were the present owners of 'The Neptune'.

[2] The parties have agreed to accept my decisions on the respective appeals in encls 20 and 21 herein as equally determinative and binding in respect of two similar applications in suit D1–27–26 of 2002 (encls 20 and 21) between *V Ships (Pte) Ltd & Anor v The Owners and/or Demise Charterers of the Ship Or Vessel 'The Mercury'*.

[3] After hearing and considering the applications, reading all the affidavits and written submissions put in by both sides, I allowed the plaintiffs' appeal vide encl 21 but dismissed the defendants' appeal vide encl 20, both ends in suit D1–27–25 of 2002. I now set out my reasons.

THE PLAINTIFFS' APPEAL IN ENCL 21

[4] I will deal with encl 21 first since this involves the question of *locus* of the defendants. If after deliberation it is my finding that the defendants lack the necessary *locus standi* to be the proper defendant in this admiralty action, the defendants' appearance entered in this action would have to be struck out (set aside) with the consequence of rendering the defendants' appeal in encl 20 academic.

[5] In encl 21, plaintiff prays for conditional appearance entered by Louis Herbelin Sdn Bhd to be set aside and for them to cease to be party to this suit, on the grounds that the latter had adopted the wrong procedure in law to protect their alleged interest if any. The plaintiff also seeks other orders consequential to the aforesaid prayers. The question for determination in this encl is: Who could be a proper defendant in an admiralty action?. The answer to this would determine whether or not Louis Herbelin has the necessary legal capacity to assume the status of the defendant in this suit, which capacity in turn would entitle them to take out an application to strike out the plaintiff's action.

[6] If Louis Herbelin fulfils the necessary prerequisites of a defendant to this action, they would have every right to enter appearance, conditional or unconditional, in this action. And, accordingly the plaintiffs' application in encl 21 would have no merit and ought to be dismissed. But if the converse applies, then Louis Herbelin's appearance in this action would have to be set aside and their status as the defendant in this action expunged, and consequently they would no longer be a party to this action.

[7] In Malaysia, the court's admiralty jurisdiction is conferred by s 24(b) of the Courts of Judicature Act 1964 ('CJA'). Section 24(b) CJA gives effect to a statute of the UK Parliament, namely the Supreme Court Act 1981 ('SCA') and renders the said UK Act as governing law applicable in matters of admiralty in Malaysia. Section 24(b) CJA empowers our courts to apply the provisions of the UK Supreme Court Act 1981 in the same manner as an English High Court would do when determining an admiralty matter under the Act. See *Kawasaki Kesin Kaisha Ltd v Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 6 MLJ 433.

[8] The useful starting point for our analysis is the form and content of the admiralty writ of summons in an action in rem as provided for in Form 155 under O 70 r 2 of the Rules of the High Court 1980 ('RHC'). Form 155 requires the defendant in an admiralty writ *in rem* to be referred simply as 'the owners of the ship or vessel (vessel name)'. This is completely unlike the more common *in personam* writ of summons where the defendant has to be properly identified by name. Indeed, this divergence distinguishes and demonstrates the essential difference between an action in personam and an action *in rem*.

[9] An action *in rem* commenced by writ in Form 155 is an action against the res, that is the thing itself and not aimed at any person unlike the normal civil suit against persons. Service of the writ *in rem* is not effected on any natural person but served on the vessel by affixing the writ to the mast or superstructure of the vessel when that vessel is within the jurisdiction of the court. That is the manner how the claim is asserted on the vessel and admiralty jurisdiction founded. See *The 'Fierbinti'* [1994] 3 SLR 864.

[10] Once service has been effected in this manner, the action proceeds *inrem* until the shipowner, that is the owner at the time that the writ was issued, enters appearance to defend the claim. At this point the action becomes an action *in personam* against the shipowner. If no appearance is entered by the owner, the action continues solely in rem against the vessel and any judgment given is solely a judgment against the res. An in rem judgment thus obtained does not create any personal liability enforceable against the shipowner other than (foregoing) the ship itself.

[11] But where the shipowner, potentially liable on the claim, enters appearance to defend the claim, any judgment subsequently obtained is not limited to the value of the vessel but is available for execution against the owner's other

assets as well. As explained in *The 'Nordglimt'* [1987] 2 Lloyds LR 470, when an admiralty writ *in rem* is served on the vessel, 'the relevant person' being the shipowner or the charterer under a charter by demise has a choice whether to defend the action or not. Only if he chooses to defend and enter appearance does the action *in rem* assumes the *in personam* character of a normal civil suit. The reason, in my opinion, is as simple as it is obvious: in an admiralty action, where the duration of a moving ship's or vessel's port-calls are as brief and transient as a moving target, it is more practical and realistic to compel its owner, demise charterer or any person having an interest in the ship or vessel to appear from the woodworks rather than to require the claimant to search for him in the woods, where a change of ownership, etc, may have meanwhile occurred in a flash.

[12] Despite the conceptual difference between the two types of action — action *in rem* and action *in personam* — it has been accepted that an action *in rem* against the ship is in reality a procedural device, a son of legal fiction to assert a maritime claim against the 'relevant person' who was the owner, or a charterer under a charter by demise, of the vessel when the cause of action arose, and remained the owner at the time when the plaintiff's writ was issued. (The *'Nordglimt'* [1987] 2 Lloyds LR 470.)

[13] It follows therefore, even though there is no need to specifically name the defendant on a admiralty writ *in rem*, because Rules of the High Court 1980 ('RHC') makes no such requirement, yet no person other than the owner or a charterer under a charter by demise of the ship or vessel when the cause of action arose and when the writ was issued could assume the status of a defendant. Only that person can enter appearance as a proper defendant as of right. Conversely, where the defendant is described but not named in a writ of summons in admiralty action *in rem*, any party entering appearance (or their solicitors) must, in addition to stating that description, also specify the full names of the person entering appearance and the nature and period of their ownership in the property subjected to the admiralty action.

[14] The test of who can be the proper defendant in an action *in rem* is provided by s 21(4) of the United Kingdom Supreme Court Act 1981 (SCA) (UK Act) which states:

> In the case of any such claim as is mentioned in s 20(2) (e) to (r), where:
>
> (a) The claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship
>
> an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:

A (i) that ship, if *at the time when the action is brought the relevant person* is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, *at the time when the action is brought*, the relevant person is the beneficial owner as respects all the shares therein. (Emphasis added)

B **[15]** Under s 21(4) of the UK Act there are four prerequisites or considerations to be fulfilled in an action *in rem*, firstly, on the claim (two prerequisites), and secondly, on the 'relevant person', that is, the proper defendant against whom to direct the claim (two prerequisites), namely:

C Prerequisite No 1 — the claim must fall under any claim mentioned in s 20(2)(e) to (r);

Prerequisite No 2 — the claim must arise in connection with the ship;

D Prerequisite No 3 — the 'relevant person' who would be liable on the claim in an action in personam *was, when the cause of action arose, the owner or charterer* of or in possession or control of the ship;

E Prerequisite No 4 — the 'relevant person' against whom to direct the claim *would be the beneficial owner* of the *ship or charterer* of it under a charter by demise *at the time when the action is brought,* who would be the proper defendant in the claim.

F **[16]** On Prerequisite No 1, the plaintiff contends that its claim falls under ss 20(2)(m) and (p) UK Act, being: (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance; and, (p) any claim by master, shipper, charterer or agent in respect of disbursements made on account of a ship.

G **[17]** On Prerequisite No 2, the plaintiff also contends that the claim arises in connection with the ship 'The Neptune' in which the plaintiff had supplied the materials/provisions/services.

[18] On Prerequisite No 3, the plaintiff further contends that the defendant
H (Salient Marine) would be liable to the plaintiff in an action in personam as Salient Marine was when the cause of action arose the owner of 'The Neptune' and is the beneficial owner of all the shares when this action was brought. 'When the action is brought' means when the writ is issued rather than when it is served.

I **[19]** It would seem that Louis Herbelin have impliedly accepted that the plaintiff's action accords with Prerequisite 1 and Prerequisite 2 but not with Prerequisite 3. In relation to Prerequisite 3, it is trite law that the issue of whether

or not Salient Marine (the defendant) would be liable to the plaintiff on the claim is a matter that should properly go for trial and cannot be disposed of under O 18 r 19 RHC 1980. (See *Schwarz v Owners of 'St Elefterio'* [1957] 1 Lloyds Rep 283; *The 'Wigwam'* [1983] 1 MLJ 148; *Middle East Tankers v Owners of the Vessel 'IRA'* [1994] 4 MLJ 109; *Hoi Soon Diesel & Trading Pte Ltd lwn Pemilik Kapal dan/atau Percarta Demis dalam Kapal 'Hope' (Ex 'Panagia') yang didaftarkan di Pelabuhan Limassol* [1997] MLJU 108.) I agree that the burden of proof on the question of who was the 'relevant person' liable *in personam* rests on the plaintiff. However, it is my considered view that at the striking out stage under O 18 r 19 of the RHC, the standard of proof required of the plaintiff is only on a lighter *prima facie* basis. In this regard, this court would have to place due consideration on the plaintiff's case that: Renaissance Cruises (S) Pte Ltd had acted as the manager and/or agent of the owner Salient Marine; Renaissance had at all material times represented to third parties, and had also acted as vessel's agent and/or manager for and on behalf of the vessel owner Salient Marine. And, to support this contention the plaintiff relies on the following evidence and arguments:

(a) an e-mail message from M/s Harper Wira Sdn Bhd dated 15August 2002 addressed to Renaissance Cruises, Singapore which states, *inter alia*, as follows: 'Reference our telcon on 14August, we would inform that the outstanding disbursements for vessel sailings up to 31 May 2002 has accumulated to RM755,364.88. Our general account for May 2002 is being despatched to you today. We shall endeavour to update accounts to current status shortly for despatch. Understand that both the two vessels viz 'The Mercury' and 'The Neptune' are now not sailing and are anchored at Malacca since early this month. We are hard pressed to settle port expenses with the local authorities and seek your urgent understanding to remit some funds to us soonest so that we in turn can pay some outstanding sums to the authorities concerned.

(b) a letter dated 1 June 2001 from Renaissance Cruises to Maritime and Port Authority of Singapore with the following information: 'We write to inform you that we have authorised V Ships (Asia Pacific) Pte Ltd to access into our MPA Account No 34009z. This is to enhance the submission of arrival/departure declaration to our vessels, 'MV The Mercury' and 'MV The Neptune'. Their MPA account is 44520P.

(c) an extract from the portnet.com.sg indicating the calls-history of the vessel 'The Neptune' and 'The Mercury' at Port of Singapore (at pp 167 to 178 of exh 'PTF–1' encl 16) which is a clear admission by Renaissance that they acted as agents for the owners Salient Marine Sdn Bhd;

(d) Exhibit 'GCH–2' encl 16 in Gan's affidavit affirmed on 10March 2003, showing that Salient Marine had insured Renaissance's liability to act as agent or managers for 'The Neptune'; and

(e) that no right thinking supplier of necessaries to ships will supply without any security for their claim. (See Shean J at p 448 in *Gulf Venture* [1984] 2 Lloyd's LR 445, which was approved in the Malaysia High Court case of *Middle East Tankers and Freighters v Owner of the Vessel and other interested party in the vessel o f MV 'IRA* '[1996] 4 MLJ 109.)

[20] Surely, at least on a *prima facie* basis, this court could and should accept the above evidence (a) to (e) and refuse denial of the plaintiff's 'day in court'. And, notwithstanding the above *prima facie* evidence adduced, the plaintiff relies on the following further ground, which found favour with me.

[21] Louis Herbelin cannot challenge the invocation of admiralty jurisdiction of the court since after entering a conditional appearance, reserving their right only to set aside service of writ, they did not apply to set aside service of the writ. Louis Herbelin have entered a conditional appearance in the action pursuant to O 12 r 6 RHC 1980. (See *Malaysian High Court Practice 2002* (Desk Ed).) Itought to be noted that Louis Herbelin had entered the conditional appearance solely for the purpose of setting aside the writ, the service of the writ or notice of the writ on them or declaring that the writ or notice has not been duly served on them. It is trite law that the consequences of the failure to comply with the condition in the conditional leave (ie with the view of setting aside the service of the writ) within 14 days after entering conditional appearance is to render the conditional appearance being transmuted into an unconditional appearance, as expressly stated under O 12 r 6(2). Thus, for all intents and purposes, Louis Herbelin's appearance is unconditional — save for setting aside the service of the writ. (See *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1; *Chan Min Swee v Melawangi Sdn Bhd* [2000] 7 MLJ 111.) In the premises, having entered such an appearance for a limited purpose, Louis Herbelin should only now proceed to challenge the service of the writ and not the court's admiralty jurisdiction. It is an established principle in admiralty law and practice that after an unconditional appearance has been entered, the issue as to whether the defendant is or is not liable on the claim is a matter for trial. (See *The 'Avro Venture'* [1987] 1 MLJ 16, the ratio in which was approved in the case of *Middle East Tankers and Freighters v Owner of the Vessel and other interested party in the vessel of MV 'IRA'*.)

[22] The term 'beneficial owner of all the shares in the ship' found in s 21(4) SCA refers to the person named as the owner of the vessel at the port of registry where the ship is registered. (See *The 'Tian Sheng No 8'* [2000] Lloyds LR 430 and *The 'Able Lieutenant'* [2002] 6 MLJ 433.) Only that particular person,

who is the 'relevant person', fulfilling either of the two criteria stipulated by s21(4) SCA, can become the proper defendant to the suit. This is 'the relevant person' who would be liable to the plaintiff on the action in person am, that is, suffer personal liability in the event the plaintiff succeeds in proving his claim. Thus, only the 'relevant person' could enter appearance as of right, conditional or otherwise, in the capacity of a defendant.

[23] All other persons who do not fall within this category but otherwise have in some way an interest in the vessel, such as mortgagees, previous or subsequent owners, charterers, suppliers, repairers, belong to a separate class of persons which I shall call 'interested parties'. For this class of persons, RHC provides a special procedure under O 70 r 16 for them to intervene in the action and thereafter protect their interests in the vessel in the capacity of interveners.

[24] In *The 'Mawan'* [1988] 2 Lloyds LR 460, Sheen J said:

> The persons referred to on the writ as 'the defendants' must be the company which was the owner of the ship *Mawan* when the writ was issued. Only that company could be liable to the plaintiffs in this action.

[25] Dato' Mahadev Shankar JCA who delivered the unanimous decision of the Court of Appeal in *Pemunya Kapal MV Brihope v Emmanuel Okwuosa* [1997] 1 MLJ 469 stated in clear terms that:

> Only the owners of the Brihope (and those legally liable for the plaintiffs' claim) should have been described as defendants .... The ship's owners (and those legally liable for the plaintiffs' claim) could enter appearance as of right. Persons interested must obtain leave to intervene and after obtaining leave appear as interveners.

[26] The Court of Appeal in the above case approved and followed a Singapore decision in *The 'Bolbina'* [1994] 1 SLR 554 on the description of the 'Defendants' in Form 155, Rules of the Supreme Court of Singapore (which is pari materia to our Form 155 in RHC) where GP Selvam J said:

> Persons against whom no claim is made ought not to be described as defendants. 'Persons interested in the ship' should form part of the citation and not be described or included as defendants. A defendant enters an appearance as of right whereas persons interested in the ship must obtain leave to intervene and after obtaining leave appear as interveners.

[27] In *The 'Abel Lieutenant'* [2002] 6 MLJ 433 my brother Zulkefli Makinudin J was faced with a similar problem. A company known as Pan Ocean claiming to be beneficial owners entered appearance as a defendant and applied to set aside/strike out the writ. They were neither the registered owners when the plaintiff's cause of action arose nor when the writ was issued. They were in fact strangers to the disputed contracts between the plaintiff and the registered owners of the vessel. Interestingly, the registered owners of the vessel also

entered an appearance as defendants. Pan Ocean argued that since the admiralty writ merely identified the defendant by description as owners of the ship or vessel, any person claiming to be the owners, in this case beneficial owners, could enter appearance as defendant as of right. The learned judge (at p 444 of his judgment) said:

> The test to determine whether a person can be a proper defendant is to consider if that person would be liable for the plaintiffs claim should the plaintiff succeed in the action. Not anyone can jump in as a defendant. On this ground alone, Pan Ocean has no basis to be the defendant. Learned counsel for Pan Ocean argued that owners includes beneficial owners. To my mind, this is plainly wrong because Pan Ocean is not liable on the claim.

[28] Further (at p 445 of his judgment), the learned judge was also of the opinion that an appearance entered by a person who is not a proper defendant to an admiralty action should be considered a nullity, when he said:

> A defendant would be liable on the claim but an intervener is not. It is my view that Pan Ocean's appearance as a defendant, when the real defendant has appeared, is not a mere irregularity but a nullity because it affects the substantive rights of the plaintiff and is prejudicial to the plaintiff. Further it is confusing to the court due to the uncertainty of the proper defendant.

[29] I am fully *ad idem* with the above reasoning and I endorse the views of the learned judge.

[30] In the present case, the plaintiffs' claim is for the price of goods and materials or necessaries supplied to the defendants' vessel 'The Neptune' at the port of Singapore in and about April 2002 to June 2002, at the request of the defendants their servants or agents, including interest and costs. Clearly and incontrovertibly, during the aforesaid material months, the registered owner of 'The Neptune' was Salient Marine Sdn Bhd.

[31] 'The Neptune' underwent a change of ownership on 3 October 2002 when Louis Herbelin, the applicant herein, became the registered owner. However, on 10 September 2002, before this change took place, when Salient Marine Sdn Bhd was still the owner of 'The Neptune', a writ *in rem* was issued. It follows that at the two material times, that is, the time when the cause of action arose and when the writ was issued, Salient Marine was the owner of 'The Neptune'. Thus, according to well settled principles, the fact that the vessel is now registered in the name of Louis Herbelin has no effect on the plaintiffs' claim because when the writ was issued 'The Neptune' was owned by Salient Marine, which vessel was then attached with a statutory lien and this lien ought to continue and survive any subsequent change of ownership. (See *'The Bolbina'* [1994] 1 SLR 554 and Ed *&F Man Ship Ltd v Heng Holdings Sea (Pte) Ltd* [1999] 1 SLR 200 and *The 'Mawan' Now Named 'Mara'* [1988] 2 Ll LR459.)

[32] Louis Herbelin's main argument is that as the new owners of 'The Neptune' they are 'directly and irreversibly' affected by any action in rem against the vessel and as such they should be allowed to enter appearance as defendants and challenge the plaintiffs' claim against the vessel. While this may be true in the sense that the claim encumbers the vessel which they allegedly now own, Louis Herbelin is not the defendant liable on the plaintiffs' claim on the supply of the said necessaries and goods to the vessel. They were not the owners of 'The Neptune' at the time the claim arose and when the writ was issued. Clearly, the plaintiffs' claim, grounded upon a contract with Salient Marine the previous owners, has nothing to do with Louis Herbeln, who could never be personally liable on the claim in the event the plaintiffs is successful. It would indeed be surprising if, as the new owners of the vessel, Louis Herbelin had not protected themselves by taking an indemnity against any claims that may be attached to the vessel prior to the sale. Whatever the circumstances, Louis Herbelin's position is merely that of an interested party who is entitled to intervene, but not a defendant. And, based on established authorities, they should have intervened in the action as an intervener pursuant to O 70 r 16 RHC which, notably, is a specific admiralty provision on action in rem in our rules. This they have failed to do.

[33] In my judgment, while there is no need to specifically name the defendant on an admiralty writ *in rem*, because RHC does not require this, yet no person other than 'that person' who was the owner of the ship or vessel when the cause of action arose or the owner or the demise charterer of the vessel when the writ was issued could, in proper procedure, and as of right, enter appearance as a defendant. In the event, I therefore rule that as Louis Herbelin was not 'that person' it cannot enter appearance as a defendant in this admiralty suit and their appearance so entered is hereby set aside.

DEFENDANTS' APPEAL IN ENCL 20

[34] Louis Herbelin has also applied to set aside the plaintiffs' action and for consequential orders. In the light of my decision in encl 21, determination of encl 20 is unnecessary. However, since counsel for the panics have made their submissions, I shall deal with the application briefly.

[35] The first point to make is even if Louis Herbelin had entered the action properly as an intervener pursuant to O 70 r 16 RHC, my view is that they are not entitled to move the court to set aside or strike out the writ as this right is only available to a proper defendant who may be liable on the claim — a fortiori in the current case where the claim is based on a supply contract. In *The 'San 003'* [1979] 2 MLJ 8 Sinnathuray J said: 'Nothing in the Rules of Court provides for an intervener to set aside the writ of summons itself'. I fully agree to this proposition.

[36] Secondly, Louis Herbelin's main argument in support of setting aside the action is that the plaintiffs' claim is not against the person liable *in personam* and thus the court's admiralty jurisdiction has been improperly invoked. Bythis, I take them to mean that the claim is not against Salient Marine, the proper defendant in this suit since the evidence shows the plaintiffs' dealings were with the Renaissance Cruises (S) Pte Ltd, another entity. The plaintiff, on the other hand, does not deny this and allege that Renaissance Cruises had at all material times acted as managers and or agents of the vessel.

[37] In my view, the plaintiffs have, on prima facie basis, established that Renaissance Cruises had acted as managers or agents of the owners. And, whether or not Salient Marine would or would not be liable for the debts incurred by Renaissance Cruises is a matter for trial.

[38] Another argument raised by Louis Herbelin is that at the material time the vessel was chartered to one Universal Cruises. The implication being that it is the demise charterer, the Universal Cruises, who should be liable for the plaintiffs' claim and not Salient Marine. The nature and character of a demise charter is well explained in the case of *The 'Guiseppe Di Vttorio'* [1998] 1 Lloyds LR 136. In my view, the evidence tendered by the Plaintiffs against this argument is acceptable to this court for the following overwhelming and cogent reasons:

(a) there was no evidence of receipt of charter hire payments except for one month, being October 1997, of a total of 58 months;

(b) there was absence of notification to the Malaysian Marine Authorities of the fact of a demise charter of the vessel;

(c) there was no notice to the Singapore Port Authorities, where the vessel regularly plied, on the existence of a demise charter;

(d) there is a letter from Malaysian Ministry of Transport dated 12 December 2002 stating the Ministry has no records of a demise charter of the vessel;

(e) the fact that Salient Marine and not any demise charterer had annually applied for and obtained a domestic shipping licence as the operator of the vessel;

(f) the fact that the master and crew of the vessel were all employees of Salient Marine.

[39] More importantly to bear in mind, is the basic flaw, which substantially diminishes any force or weight to their arguments is the answer to the question: how could Louis Herbelin, as a subsequent purchaser of the vessel and total strangers at the time when the dealings took place, be suddenly equipped with first hand knowledge to attest, confirm or deny commercial transactions that preceded them? The answer is: it would have to come from Salient Marine, the proper defendant.

CONCLUSION

[40] Plaintiffs' appeal in encl 21 is allowed with costs and defendants' appeal in encl 20 is dismissed with costs. Following from this, by agreement of the parties, plaintiffs' appeal in encl 21 in suit no D1–27–26 of 2002 is allowed with costs and defendants' appeal in encl 20 is dismissed with costs.

Plaintiffs appeal allowed. Defendant's appeal dismissed with costs,

Reported by Peter Ling